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Federal Communications Commission  
Office of the Secretary

The Delegation of the European Commission presents its compliments to the Department of State and has the honour to refer to the Report and Order and Further Notice Of Proposed Rulemaking 02-230 in the matter of Digital Broadcast Content Protection released by the Federal Communications Commission (FCC) on 4 November 2003 (hereafter, "the Notice").

The European Commission is no stranger to the issue of how legal and technical methods should protect copyright as demonstrated, in particular, by the debate and adoption of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The European Commission agrees on the need to protect the rights of the providers of broadcast content and considers it a fair objective to prevent the widespread online redistribution of unauthorised digital content.

Notwithstanding the above, any policy decision mandating technical measures of protection of copyright and related or neighbouring rights should ensure that such measures will contribute to provide incentives for content creation while offering the same opportunities to all those involved in the development of technological measures of copyright protection or the production of electronic equipment and ensuring continued availability of content to consumers, consistent with copyright law.

The European Commission, in line with its eEurope2005 policy objectives for multiplatform access to Information Society Services, including services provided by next-generation interactive broadcasting networks, aims at promoting solutions for digital content management and protection that are widely agreed by Industry, right-holders and other stakeholders, developed under an open-standards umbrella, safeguard basic requirements like interoperability at different levels of the multimedia chain and do not preclude any legitimate business model.

The European Commission welcomes the FCC recognition in its Interim Rule of the need to balance various public policy objectives, to establish an open and transparent process for selecting digital broadcast content protection and recording technologies and to condition the approval of such technologies on reasonable and non-discriminatory licensing terms.

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However, the decision taken by the FCC on 4 November 2003 to adopt an embedded content control mark (the "flag") as the appropriate type of content protection for digital broadcast television in the US, raises a number of questions and potential concerns. Several have already been identified by the FCC in its Notice. The European Commission welcomes the initiative of the FCC to seek further comments on some of these issues.

As a matter of principle, it would have seemed highly desirable to let the issue of copy management and protection in the hands of an open and international standardisation process. International standardisation, when carried out through an open, transparent and consensus seeking process with the participation of all relevant stakeholders has an enormous potential to prevent technical barriers to trade, increase market access for all players and foster the dissemination of technologies.

In this respect, the work and conclusions of the Broadcast Protection Discussion Subgroup (BPDG) of the Copy Protection Technical Working Group, to which the Notice refers extensively, do not seem to meet those requirements.

Additionally, it should be recalled that due attention should be paid to the respect of the obligations derived from the Agreement on Technical Barriers to Trade, which also contributes to increase transparency in this area and which requires WTO Members to notify other Members through the WTO Secretariat of the proposed technical regulation they intend to adopt which may have a significant effect on trade, together with a brief indication of its objective and rationale.

This having been said, the European Commission agrees with the FCC that it will be essential to guarantee the openness and transparency of the process for selecting the secure technologies which will give effect to the flag, but suggests that the process should be sufficiently flexible as to adapt its criteria to accommodate other technologies than the flag, which may be substantially different, but equally effective.

In both cases, these are essential requirements to provide incentives to the development of new technologies and avoid pre-determining future business models. Indeed, while ensuring the protection of copyright and related or neighbouring rights, new technologies may bring about much needed new business and distribution models that will ultimately increase consumer choice and satisfaction and expand digital media markets. It is important not to create obstacles or disadvantage such technologies.

In particular, a system based on a test relying on market acceptance might result in an unfair advantage to incumbent technology providers, fail to provide competitive safeguards to new

entrants and lead to a number of established players acting as "gatekeepers". As a result, the introduction of new products with new functionality, not imagined today, may be prevented or slowed down. A market acceptance or an equivalent performance test would potentially cause conflicts of interest and entrench incumbent technologies at the expense of new candidate technologies.

In the EU, a process known as "functional regulation", which combines the required effectiveness and transparency, has been used with success. This process consists in the identification of functional and objective criteria that should be used to assess the compliance of proposed technologies, followed by a process of self-certification, monitored by an independent arbitrator.

Due consideration should also be given to the binding effects of approved protection technologies on downstream networking and recording technologies. Interoperability with other technologies handling content is necessary to avoid locking the consumer within a single technology.

In addition, it would be inappropriate for public policy to back proprietary technologies without ensuring – at the very least – that licenses are available on fair, reasonable and non-discriminatory terms and conditions.

Finally, at the same time, mandated use of copy protection technologies for digital broadcast should not unduly restrict reasonable consumer uses.

The Delegation of the European Commission would be grateful for the views of the Department of State, and requests that this *Note Verbale* be transmitted to the Federal Communications Commission so that it can be part of the proceedings in this matter and put in the public record.

The Delegation of the European Commission avails itself of the opportunity to renew to the Department of State the assurance of its highest consideration.



Washington D.C.

15th March 2004